80-704

Supreme Court, U.S.
FILED
OCT 30 1980
MICHAEL RODAK

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al.,

Appellees-Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Appellants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

MAYER, BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604
(312) 782-0600

RUDNICK & WOLFE
30 North La Salle Street
Chicago, Illinois 60602
(312) 368-4000

NICHOLAS G. MANOS
Attorney for William M. Gibbons, Trustee of Chicago, Rock Island & Pacific Railroad Company

ALBERT E. JENNER, JR.
DANIEL R. MURRAY
DEBORAH H. BORNSTEIN
Attorneys for Henry Crown, et al.

MILTON L. FISHER
HAROLD L. KAPLAN
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

TERRY F. MORITZ
MICHAEL C. KIM
Attorneys for The First National Bank of Chicago, as Indenture Trustee

October 30, 1980

QUESTION PRESENTED

Should the United States Court of Appeals for the Seventh Circuit be permitted to review the district court's refusal to vacate its preliminary injunction, where the injunction which the district court refused to vacate is already before this Court on direct review under 28 U.S.C. §1252, and where review by the Seventh Circuit would create a serious risk of inconsistent and duplicative adjudications by this Court and the Court of Appeals.[1]

---

[1]The Petitioners are: William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company ("Trustee"), The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Chicago, Rock Island and Pacific Railroad Company ("Creditors"). All of the Petitioners have actively participated in these proceedings in the district court, and are appellees in the RLEA's appeal to the Court of Appeals and in the appeals pending before this Court.

The Railway Labor Executives Association ("RLEA") is the appellant in the appeal before the United States Court of Appeals for the Seventh Circuit, No. 80-2487, from the district court's Order of October 15, 1980. RLEA intervened as a defendant on June 9, 1980 in the district court, and is the appellant in an appeal to this Court of the district court's June 9, 1980 injunction. *RLEA* v. *Gibbons, et al., appeal docketed*, No. 80-415 (U.S. S. Ct., September 15, 1980).

The United States, the Interstate Commerce Commission and Secretary of Transportation Neil Goldschmidt were defendants in the original district court action. They have taken an appeal of the June 9, 1980 injunction to this Court. That appeal has not been docketed. Petitioners are advised that the Government intends to join the appeal to the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
List of Parties	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTORY STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. A. Because A Direct Appeal Has Been Taken To This Court Pursuant To 28 U.S.C. §1252, Jurisdiction Over RLEA's Subsequent Appeal Lies Only In This Court	8
B. Section 124 Of The Rock Island Act, As Amended, Does Not Affect The Supreme Court's Jurisdiction In This Matter	10
II. If This Court Determines That The Court Of Appeals May Have Jurisdiction Over This Appeal, It Should Grant This Petition Under The General Principles Governing Writs Of Certiorari Before Judgment	12
CONCLUSION	17

Page

APPENDICES

A. Excerpts from the Transcript of Proceedings, October 7, 1980 ..... a-1

B. Order of the United States District Court, October 15, 1980 ..... b-1

C. Excerpts from the Transcript of Proceedings, June 9, 1980 ..... c-1

D. Preliminary Injunction, June 9, 1980 ..... d-1

E. Excerpts from the Transcript of Proceedings, June 20, 1980 ..... e-1

F. RLEA's Notice of Appeal to the United States Supreme Court f-1

G. The Government's Notice of Appeal to the United States Supreme Court g-1

H. RLEA's Notice of Appeal to the United States Court of Appeals for the Seventh Circuit h-1

I. Excerpts from the Rock Island Railroad Transition and Employee Assistance Act i-1

J. Excerpts from the Conference Report on the Railroad Transportation Policy Set of 1980 (Amendments to the Rock Island Act) j-1

TABLE OF AUTHORITIES

CASES

	Page
Bolling v. *Sharpe,* 344 U.S. 873 (1952)	15
Brown v. *Board of Education,* 344 U.S. 1 (1952)	15
Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868)	12
Gibbons v. *Railway Labor Executives' Ass'n (In re* Chicago, Rock Island and Pacific Railroad Company), No. 75 B-2697 (N.D. Ill. June 9, 1980) (order granting preliminary injunction)	2, passim
Gibbons v. *Railway Labor Executives' Ass'n (In re* Chicago, Rock Island and Pacific Railroad Company), No. 75 B-2697 (N.D. Ill. October 15 & 16, 1980) (orders denying motions to vacate preliminary injunction)	7, passim
Glidden v. *Zdanok,* 370 U.S. 530 (1962)	12
Hannah v. *Larche,* 363 U.S. 420 (1960)	14
Marbury v. *Madison,* 5 U.S. (1 Cranch) 137 (1803)	11
McLucas v. *DeChamplain,* 421 U.S. 21 (1975)	11, 12
Porter v. *Dicken,* 328 U.S. 252 (1946)	14
Rickert Rice Mills, Inc. v. *Fontenot,* 297 U.S. 110 (1936)	14
Railway Labor Executives' Ass'n v. *Gibbons (In re* Chicago, Rock Island and Pacific Railroad Company), *appeal docketed,* No. 80-415 (U.S. S. Ct., Sept. 15, 1980); 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980) (opinion denying stay application); 100 S. Ct. 3057 (July 2, 1980) (order denying stay application)	2, 5, 15
United States v. *Bankers Trust Co.,* 294 U.S. 240, 243 (1935)	13

	Page
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1871)	12
United States v. *Raines*, 362 U.S. 17 (1960)	9, 11, 14
United States v. *Thomas*, 361 U.S. 950 (1960)	14
United States v. *United Mine Workers*, 330 U.S. 258 (1947)	13
Youngstown Sheet and Tube Co. v. *Sawyer*, 343 U.S. 579 (1952)	13, 16
CONSTITUTIONAL PROVISIONS	
Fifth Amendment, United States Constitution	3, 5, 9
STATUTES	
11 U.S.C. §205	4
28 U.S.C. §1252	2, 3, 5, 7-14
28 U.S.C. §1254	3, 12, 13
28 U.S.C. §2101(e)	3, 12, 13
Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §§1005, 1008	4, 6, 9-11, 13, 16
Railroad Transportation Policy Act of 1980 (Staggers Rail Act of 1980, Rock Island Act amendments), Pub. L. No. 96-448, Title VII, Section 701	4-7, 9-13, 15, 16
Supreme Court Rule 18	15
OTHER AUTHORITIES	
Berger, Congress v. The Supreme Court 286 (1969)	12
Moore's Federal Practice, Vol. 12 §411.23 (2nd ed. 1980)	9
R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978)	9, 13, 14

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al.,

Appellees-Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Appellants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTORY STATEMENT

Petitioners pray that this Court issue a writ of certiorari to review and *affirm* the district court's Order of October 15, 1980, prior to judgment by the Court of Appeals. The appeal which Petitioners ask this Court to review was taken to the United States Court of Appeals for the Seventh Circuit by the Respondent Railway Labor Executives' Association ("RLEA"), from the denial of RLEA's Motion to Vacate a Preliminary Injunction issued by District Judge Frank J. McGarr. That injunction was already before this Court on direct appeals by the RLEA, the

United States and the Interstate Commerce Commission ("Commission") under 28 U.S.C. §1252.

OPINIONS BELOW

Judge McGarr's statements from the bench on October 7, 1980 after oral argument on the Motions to Vacate appear at Appendix A (*infra*, App. pp. a-1, *et seq.*). Judge McGarr's Order of October 15, 1980, as supplemented by the Order of October 16, 1980, by which he denied the RLEA's Motion to Vacate the Preliminary Injunction of June 9, 1980, appears at Appendix B (*infra*, App. pp. b-1, *et seq.*).

Judge McGarr's statements from the bench on June 9, 1980 after oral argument on the Motion for a Preliminary Injunction and Declaratory Judgment appear at Appendix C (*infra*, App. pp. c-1, *et seq.*). Judge McGarr's initial Preliminary Injunction and Declaratory Judgment of June 9, 1980, from which RLEA has appealed to this Court, appears at Appendix D (*infra*, App. pp. d-1, *et seq.*). Judge McGarr's statements from the bench on June 20, 1980, when he denied the Motion to Reconsider filed by the United States and the Interstate Commerce Commission, which was joined by the RLEA, appear at Appendix E (*infra*, App. pp. e-1, *et seq.*).

JURISDICTION

Judge McGarr entered his Preliminary Injunction on June 9, 1980. Judge McGarr declined to alter the injunction, as requested by the United States, the Interstate Commerce Commission and the RLEA, on June 20, 1980. The RLEA's Notice of Appeal to this Court under 28 U.S.C. §1252 was filed on June 11, 1980, and docketed on September 15, 1980. *RLEA* v. *Gibbons, appeal docketed*, No. 80-415 (U.S. S. Ct., September 15, 1980), and appears at Appendix F (*infra*, App. p. f-1). A Notice of Appeal to this Court under 28 U.S.C. §1252 was filed by the United States, the

Interstate Commerce Commission and the Secretary of Transportation on July 8, 1980, and appears at Appendix G (*infra*, App. pp. g-1, *et seq.*).

The Order of Judge McGarr denying the RLEA's motion to vacate was entered on October 15, 1980. Notwithstanding the pendency of the appeals before this Court, the RLEA filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit on October 16, 1980, which appears at Appendix H (*infra*, App. pp. h-1, *et seq.*).

This Court has jurisdiction of the RLEA's appeal of the October 15, 1980 order under 28 U.S.C. §1252, by which all subsequent appeals of matters already on appeal to this Court under that statute are to be taken to this Court.

This Court also has jurisdiction to grant a writ of certiorari before judgment by the Court of Appeals under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(e).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution, upon which Judge McGarr relied in issuing his injunction of June 9, 1980 and denying the Motions to Vacate on October 15, 1980, provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

---

[2]On October 25, 1980, the Petitioners filed in the Court of Appeals a Motion to Dismiss Or Certify The Question On Appeal To The United States Supreme Court. The Motion to Dismiss was grounded on lack of jurisdiction in the Court of Appeals under 28 U.S.C. §1252. The Motion to Certify was grounded on the authority of 28 U.S.C. §1254(3), which permits the Court of Appeals to certify to this Court isolated questions of law as to which guidance is desired.

Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §§1005, 1008 ("Rock Island Act"), appear at Appendix I (*infra*, App. pp. i-1, *et seq.*).

The amendments to the Rock Island Act of the National Rail Transportation Policy Act of 1980, Pub. L. No. 96-448, H. R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), Title VIII, Section 701, *reprinted in* 96th Cong. Rec. H. 9911-12 (daily ed. Sept. 29, 1980) ("Staggers Rail Act"), appear at Appendix J (*infra*, App. pp. j-1, *et seq.*).

STATEMENT OF THE CASE

Judge Frank J. McGarr, of the United States District Court for the Northern District of Illinois, has exercised jurisdiction over the Rock Island's reorganization and liquidation proceedings under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205, since 1975. On January 25, 1980, in response to the urgings of the Rock Island creditors and the recommendations of the Federal Railway Administration and the Court's independent expert, Judge McGarr ordered the liquidation of the Rock Island estate on the ground that its reorganization as an operating railroad was no longer possible. On June 2, 1980, Judge McGarr reaffirmed his January 25 ruling and confirmed the systemwide abandonment of the Rock Island.

Upon signature by the President on May 30, 1980, the Rock Island Transition and Employee Assistance Act became effective. Sections 106 and 110 of the Rock Island Act impose up to $75,000,000 in new labor protection obligations on the Rock Island estate. The statute compels the Trustee to fund the new employee protection obligations directly from the assets of the estate or through federal loans. The Act mandates that the reorganization court must accord cost of administration status to the expense of this labor protection scheme.

On June 9, 1980, Judge McGarr declared the Rock Island Act to be unconstitutional, and enjoined its implementation. He based his ruling on the ground that the Act would work a taking of the estate's property in violation of the Fifth Amendment to the United States Constitution, by imposing a new $75,000,000 obligation on the estate to achieve a purported public purpose. He found that the Act's taking would cause irreparable harm to the Rock Island estate, through disruption of the estate's liquidation and a clear violation of the estate's Fifth Amendment rights. Judge McGarr enjoined the Government and the Interstate Commerce Commission from implementing the Act and the Trustee from complying with it. The United States and the Commission subsequently filed a Motion to Reconsider before Judge McGarr, which was joined by the RLEA. After the filing of briefs and oral argument, Judge McGarr denied the motion on June 20, 1980.

On June 11, 1980, the RLEA filed with the District Court a Notice of Appeal to this Court pursuant to 28 U.S.C. §1252. The RLEA filed its Jurisdictional Statement and docketed its appeal on September 15, 1980. The Government filed a Notice of Appeal to this Court on July 8, 1980. That appeal has not yet been docketed.

On June 21, 1980, the RLEA filed an application addressed to Justice Stevens as Circuit Justice, for a stay of Judge McGarr's June 9 injunction. That application was joined by the Government. In a memorandum opinion, Justice Stevens denied the application for a stay. *RLEA* v. *Gibbons*, No. 80-415, *appeal docketed*, Sept. 15, 1980, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980). This Court subsequently sustained Justice Stevens' denial of RLEA's stay motion. *RLEA* v. *Gibbons*, supra, 100 S. Ct. 3057 (July 2, 1980).

On September 29, 1980, Congress passed certain amendments to the Rock Island Act as part of the Staggers Rail Act of 1980. These amendments reenacted without substantial change Sec-

tions 106 and 110 of the Rock Island Act, which contain the basic labor protection scheme of the Rock Island Act. The amendments establish a shorter time period than was contained in the original version of the Act for the formulation of a plan and the imposition of labor protection obligations on the Rock Island estate (fifteen rather than thirty days). In addition, Section 124 prescribes certain procedures for judicial review which operate only prospectively. The new Section 124(c) of the Act provides that a possible later remedy under the Tucker Act is not precluded by any of the Rock Island Act's provisions. The Staggers Rail Act amendments do not alter the $75,000,000 labor protection obligation imposed on the estate by the original Rock Island Act. Further, the amendments contain no acknowledgement that compensation for the property taken from the estate is owed by the government.

Based upon these amendments, on October 6, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Rock Island Act unconstitutional, and to lift his outstanding injunction.[3] Judge McGarr found that the Staggers Rail Act amendments failed to cure the Rock Island Act's basic constitutional infirmities, describing the Act's changes as "cosmetic." (Transcript of Proceedings, October 7, 1980 (*infra*, App. A at a-2). After hearing oral argument on October 7, 1980, Judge McGarr commented:

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction.

Transcript of Proceedings, October 7, 1980, at page 31 (*infra*, App. A at a-3).

---

[3]Although the Act was not signed into law until October 14, 1980, the Motions to Vacate were filed on October 6, 1980, and oral argument was heard on October 7, 1980, in anticipation that the Act would be signed. The Trustee and Creditors subsequently filed a brief in response to the motions, and the RLEA and the Government filed reply briefs. Judge McGarr's Order denying the motions was entered on October 15, 1980.

On October 15, 1980, after the Staggers Rail Act was signed into law, Judge McGarr ruled consistently with his earlier comments from the bench. He found that the Rock Island Act continued to expose the estate to irreparable harm, and determined that his previous injunction still governed proceedings under the Act. He refused to vacate his earlier order and determined:

> Pursuant to the requests for relief in the written filings and arguments of counsel the court orders the continuance of the preliminary injunction.

Order, October 15, 1980 (*infra*, App. B at b-3).

On October 16, 1980, RLEA filed a Notice of Appeal from the October 15 Order to the United States Court of Appeals for the Seventh Circuit (*infra*, App. H at h-1).

The law of this case as stated by Judge McGarr on October 15, 1980, is that the amended Rock Island Act is fundamentally a reenactment of the same unconstitutional taking that resulted from the original Rock Island Act. The validity of Judge McGarr's initial ruling as to the constitutionality of the Rock Island Act is now before this Court, and underlies the validity of the Order of October 15, 1980. Thus, the appeal to the Seventh Circuit as to which certiorari is now sought is brought from a subsequent order concerning the *same statute* and the *same injunction* as to which the RLEA and the Government have already invoked this Court's jurisdiction under 28 U.S.C. §1252.

The Trustee and Creditors submit that 28 U.S.C. §1252 and the usual considerations of judicial economy and consistency governing writs of certiorari before judgment by courts of appeals, require that the subsidiary question of law raised on RLEA's appeal of the October 15, 1980 Order to the Seventh Circuit should be determined by this Court. That review should occur in the same proceeding in which this Court will review

Judge McGarr's determination of June 9, 1980 as to the constitutionality of the Rock Island Act. The Trustee and Creditors state the following reasons in support of this Petititon for a Writ of Certiorari to the Seventh Circuit prior to that Court's judgment on the RLEA's appeal of the October 15 Order:

1. An appeal in this matter has been taken to and is pending before this Court pursuant to 28 U.S.C. §1252. That statute requires that this Court retain exclusive jurisdiction over the entire matter.

2. Avoidance of inconsistent adjudications and piecemeal appellate review, judicial economy and the intent of Congress to expedite adjudication of the constitutionality of the Rock Island Act, mandate that the sole issue raised in this appeal should be determined in a single, comprehensive proceeding, with the issues which underlie it in the direct appeal already pending before this Court.

Moreover, in an effort to comply with the extraordinarily short period for review apparently required by the amended Rock Island Act, the Court of Appeals has scheduled extremely early briefing and argument of this appeal. Briefing on the merits is to be completed by November 11, 1980, and oral argument has been set for November 13, 1980. Therefore, to enable the Petitioners, the Court of Appeals and this Court to avoid unnecessary and duplicative efforts, and to avoid the serious due process problems presented by this curtailed schedule, the Petitioners respectfully request that this Petition be ruled upon on an emergency basis, prior to oral argument in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

A. Because A Direct Appeal Has Been Taken To This Court Pursuant to 28 U.S.C. §1252, Jurisdiction Over RLEA's Subsequent Appeal Lies Only In This Court.

The Trustee and Creditors submit that the only issue which the RLEA could raise before the Court of Appeals must be governed

by determination of the underlying questions concerning the Rock Island's constitutionality, which are already before this Court. That issue may be stated as follows:

> Does the addition of the new Section 124(c) of the Rock Island Act which states that '[n]othing in this Act . . . shall limit the right of any person to commence an action . . . under . . . the Tucker Act', or any other amendment to the Rock Island Act, correct the Act's unconstitutionality under the due process and governmental takings provisions of the Fifth Amendment to the United States Constitution?

Clearly, this issue is subsidiary to the issues regarding the constitutional validity of the original Rock Island Act which are before this Court on appeal. Moreover, any decision by the Court of Appeals regarding this subsidiary question cannot dispose of the issues already before this Court.

The statutory provision under which the RLEA filed its initial appeal of Judge McGarr's June 9, 1980 injunction before this Court requires that RLEA's appeal of the subsidiary order of October 15, 1980 must be treated as already before this Court. 28 U.S.C. §1252 expressly provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

In *United States* v. *Raines*, 362 U.S. 17, 27 n. 7 (1960), this Court noted that "the broad nature of §1252" indicates the "desire of Congress that the whole case come up." Professor Moore explained the statute's purpose in his comment concerning *Raines*:

> Clearly the Court was construing §1252 in a manner to avoid piecemeal appeals. This construction seems true to the congressional intent since §1252 specifically provides that subsequent, prior, and cross appeals shall be taken to the Supreme Court by any party who has received notice of appeal under §1252.

12 *Moore's Federal Practice* §411.23 (2d ed. 1980). *See also*, R. Stern and E. Gressman, *Supreme Court Practice*, (5th ed. 1978) ["Stern and Gressman"] at 79.

In sum, the appeals to the Supreme Court under 28 U.S.C. §1252 have invoked this Court's power over *all* issues raised in this subsequent appeal. Section 1252 requires that the jurisdiction of this Court may be deemed to have been invoked as to this collateral appeal by the taking of the initial appeal to this Court. Having chosen to pursue appellate review under a statute which requires that all subsequent appeals must be brought to the Supreme Court, the RLEA should be bound by that decision for purposes of this subsequent appeal of a collateral order. Moreover, by moving to vacate Judge McGarr's June 9, 1980 Order before proceeding under the amended Rock Island Act, the Government and the RLEA have implicitly conceded that the amended Rock Island Act is not new legislation. By the terms of Judge McGarr's October 15 Order, the injunction now appealed from is the same June 9, 1980 injunction that is already before this Court.

Thus, this Court should grant the writ of certiorari to give effect to the statutory mandate of 28 U.S.C. §1252.

B. Section 124 Of The Rock Island Act, As Amended, Does Not Affect The Supreme Court's Jurisdiction In This Matter.

Section 701(a)(1) of the Staggers Rail Act of 1980 amends Section 124(a) of the Rock Island Act to provide, in pertinent part, as follows:

> Sec. 124(a) Notwithstanding any other provision of law, any appeal from—
>
> (1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act;
>
> . . .
>
> shall be taken to the United States Court of Appeals for the Seventh Circuit.

The Trustee and Creditors submit that this prospective language does not govern this appeal, which had been docketed in this

Court before the statute was enacted. The prospective language of the new Section 124(c) cannot be read to divest this Court of jurisdiction over that pending appeal.

The view, apparently adopted by the RLEA, that the Staggers Rail Act amendments were intended to strip this Court of jurisdiction over a pending appeal raises fundamental issues concerning the constitutional separation of powers and due process principles. *See, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Certainly, the prospective language of the Act cannot be read as evidence that Congress intended to take the extraordinary step of divesting the Supreme Court of jurisdiction in an already docketed appeal.[4] More express language than that of the Rock Island Act amendments is required to infer this extreme intent.

In *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975), this Court held that: "an appeal under §1252 brings before us, not only the constitutional question, but the whole case . . . , including threshold issues of subject matter jurisdiction." (Citations omitted.) This reading is consistent with other determinations as to the purpose of Section 1252. *See, e.g., United States* v. *Raines, supra,* 362 U.S. at 20. Thus, if an issue as to proper appellate jurisdiction has arisen through this subsequent Congressional action, or

---

[4] The legislative history of the Rock Island Act and the Explanatory Statement of the Conference Committee published on the date of the Act's passage indicate that Congress was aware that appeals of the June 9, 1980 order were pending in the Supreme Court. See Joint Explanatory Statement of the Committee of Conference, *infra*, App. J at j-5. However, the amendment to Section 124(a) of the Rock Island Act, which requires only that *subsequent* appeals be filed before this Court, was passed by the House of Representatives on September 9, 1980, before the RLEA docketed its appeal to this Court on September 15, 1980. That section remained unchanged and was passed by both Houses of Congress without further comment, in the final version of the Act passed on September 29, 1980. Thus, nothing in the Act's legislative history indicates that the amendments were intended to strip the Supreme Court of jurisdiction over already docketed appeals.

because an appeal was taken to the Court of Appeals, that issue must be decided by this Court, along with other issues raised in the initial appeal. If an issue as to potential conflict between the jurisdictional allocation of 28 U.S.C. §1252 and the Staggers Rail Act amendments has arisen, *McLucas* v. *DeChamplain, supra,* plainly indicates that those issues, like others in this appeal, are now before this Court as a result of RLEA's previous appeal under 28 U.S.C. §1252.[5]

II.

If This Court Determines That The Court Of Appeals May Have Jurisdiction Over This Appeal, It Should Grant This Petition Under The General Principles Governing Writs Of Certiorari Before Judgment.

If, contrary to the argument in Part I of this Petition, this Court determines that the RLEA's appeal was properly taken to the Court of Appeals under Section 124(a) of the amended Rock Island Act, then this Court should exercise its ordinary jurisdiction under 28 U.S.C. §1254(1) and §2101(e) to grant certiorari

---

[5]There are authorities which suggest that Congress may constitutionally alter the Supreme Court's jurisdiction over a pending appeal. See, e.g., Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868). However, those authorities are inapposite here and have been drawn into question by courts and commentators. In his dissent in Glidden v. Zdanok, 370 U.S. 530, 605 n.1-11 (1962), Justice Douglas wrote: "[t]here is a serious question whether the *McCardle* case could command a majority view today." See also, e.g., R. Berger, *Congress v. The Supreme Court* 286 (1969).

Moreover, in United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), Congress was declared to be without power to withdraw jurisdiction where that withdrawal would amount to a rule of decision in a pending case. In this case, if Section 124 of the Rock Island Act is construed as a withdrawal of Supreme Court jurisdiction, the principles outlined in *Klein* would be violated.

before judgment, based upon the principles which normally govern such writs.[6]

This Court's power to grant writs of certiorari before judgment in cases pending in the Courts of Appeals derives from two separate provisions of the Judicial Code. 28 U.S.C. §1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .[7]

Similarly, 28 U.S.C. §2101(e) provides as follows:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

The purposes served by these statutes are identical to those which underlie Section 1252's requirement that all subsequent or cross appeals must be brought to the Supreme Court after a direct

---

[6]The language of Section 124(a) requires only that appeals from future orders with regard to the constitutionality of the Rock Island Act be taken to the United States Court of Appeals for the Seventh Circuit. It has no effect on this Court's power to grant a writ of certiorari before judgment once such an appeal has been taken.

[7]The Trustee and Creditors were parties to the proceedings before Judge McGarr and are appellees in the RLEA's appeal to the Court of Appeals and in the appeals of the RLEA and the Government to this Court. The language of Section 1254(1) specifically permits *any party* to the proceedings below, even if successful, to petition for a writ of certiorari to a court of appeals before judgment, once an appeal has been taken by another party to a court of appeals. See, e.g., United States v. Bankers Trust Co., 294 U.S. 240, 243 (1935); United States v. United Mine Workers, 330 U.S. 258 (1947); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); Stern and Gressman, *supra* 57-58. Thus, the Trustee and Creditors clearly have standing to bring this Petition, although successful in the district court.

appeal has been brought under Section 1252. These purposes include the prompt resolution of important constitutional questions, and consistency and economy in the allocation of judicial resources. Stern and Gressman have explained the application of the power to grant certiorari before judgment:

> The Court has exercised this power not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals.

Stern and Gressman, *supra,* 55-56.

Cases in which this Court has granted certiorari prior to decision by courts of appeals evidence the purposes which such review has served. For example, in granting an application for certiorari in *United States* v. *Thomas*, 361 U.S. 950, 950-951 (1960), the Court stated:

> It appears . . . that the issues raised in No. 64, *United States* v. *Raines*, now pending on appeal in this Court, are pertinent to the disposition of this case. In view of this and of the fact that the issues raised by this application are closely related to those involved in the merits of the controversy now before the Court of Appeals, the Court believes that the entire matter should be considered at one time.

See also, *e.g.*, *Hannah* v. *Larche*, 363 U.S. 420, 422 n. 3 (1960); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946). In *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U.S. 110 (1936), this Court had earlier held a statutory taxing provision unconstitutional and upheld an injunction against its implementation. Congress had amended the statute in an attempt to cure its constitutional infirmities. This Court granted certiorari before judgment by the Court of Appeals. The Court found that the statute's unconstitutionality

was not cured by the statutory amendments and ordered the issuance of an injunction to prevent the collection of the tax. In *Brown* v. *Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of the case of *Bolling* v. *Sharpe*, then pending in the Court of Appeals for the District of Columbia, and invited the filing of a petition for certiorari before judgment to consider issues similar to those pending in *Brown. Bolling* v. *Sharpe*, 344 U.S. 873 (1952).

Supreme Court Rule 18 (1980 Revisions), requires a showing of public importance to support the issuance of a writ of certiorari before judgment. Rule 18 provides:

> A petition for a writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

(Citations omitted.)

Throughout these proceedings, the RLEA has argued that this litigation presents issues of great public importance. See, *e.g.*, Jurisdictional Statement, *RLEA* v. *Gibbons*, *supra* (U.S. S.Ct., September 15, 1980). The Trustee and Creditors agree that the delay and disruption in the liquidation of the Rock Island estate caused by the imminent loss of $75,000,000 of the estate's assets is of pressing importance. They submit that the clear infringement of the Rock Island's constitutional due process and property rights contemplated by the Act is also a matter of public importance. Moreover, the Staggers Rail Act's amendment to Section 124(b) of the Rock Island Act, which requires the Court of Appeals to "render a final decision no later than 60 days after the date" of filing of the last appeal concerning the Act's constitutionality, reflects Congressional awareness of the public importance

of these appeals. In addition, the important constitutional issues raised in these appeals are clearly ripe for review by this Court, and the delay and confusion which would be caused by an additional layer of review is clearly unwarranted. *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer* (*Steel Seizure Case*), 343 U.S. 579, 585 (1952).

As has already been pointed out in this Petititon, Judge McGarr ruled on October 15 that the Staggers Rail Act's amendments on which the RLEA based its Motion to Vacate worked no fundamental change in the Rock Island Act. Thus, the basic questions as to the Act's constitutionality which were determined in favor of the Trustee and Creditors by Judge McGarr on June 9 and June 20, 1980, and preliminarily by Justice Stevens on June 28, 1980, were not altered by Judge McGarr's ruling on October 15, 1980. If the RLEA's appeal was properly brought to the Court of Appeals, the issues raised on that appeal must be limited to those not raised in the appeal already docketed before this Court. Any determination by the Court of Appeals as to the issue before it must be governed by this Court's determination of the issues which underlie that limited question. Conversely, the determination of the Court of Appeals on the subsidiary issue presented for its review cannot dispose of the more fundamental questions before this Court. Thus, efficient allocation of judicial resources requires that this Court review the subsidiary issue concerning the Rock Island Act amendments in the same proceeding in which it determines the constitutionality of the initial Rock Island Act.

The significant questions regarding the Rock Island Act's constitutionality sought to be raised before the Court of Appeals are already before this Court. Moreover, Supreme Court review is likely to be sought of any Court of Appeals decision. Therefore, the Congressional intent of prompt adjudication of the constitutional issues raised in this appeal would best be served by a single, comprehensive review of these proceedings in this Court.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that this Court should grant their Petition for a Writ of Certiorari to the United States Court of Appeals prior to judgment by that Court and *affirm* the Orders of the United States District Court for the Northern District of Illinois of June 9 and October 15, 1980.

Respectfully submitted,

Of Counsel:

NICHOLAS G. MANOS
332 South Michigan Avenue
Chicago, Illinois 60604
(312) 435-7494

By_____
Nicholas G. Manos
Attorney for William M. Gibbons, Trustee of the Chicago Rock Island & Pacific Railroad Company

JENNER & BLOCK
One IBM Plaza
44th Floor
Chicago, Illinois 60611
(312) 222-9350

By_____
Albert E. Jenner, Jr.
Daniel R. Murray
Deborah H. Bornstein
Attorneys for Henry Crown, et al.

RUDNICK & WOLFE
30 North LaSalle Street
Chicago, Illinois 60602
(312) 368-4000

By_____
Terry F. Moritz
Michael C. Kim
Attorneys for The First National Bank of Chicago as Indenture Trustee

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

By_____
Milton L. Fisher
Harold L. Kaplan
Attorneys for Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustee

October 30, 1980

APPENDIX A

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I

would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all un-

constitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants.

No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock

Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements

appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR

United States District Judge

DATED: October 15, 1980

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1, lines 1 and 2 [p. b-1, lines 1 and 2 and first two words of line 3] should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3, line 13 [p. b-3, lines 14 and 15] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4, line 4 [p. b-3, line 32] should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4, line 16 [p. b-4, line 11] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated an [d] hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore

recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the

other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the

labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated [*sic*] appellate procedure. The second, including the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrusion of the Court into this implementation of this statutory program on constitutional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constitutional issues here. My reservations, however, are as to the procedural anomalies which this statute embodies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors

and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "Continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the

public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward, that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not

necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy

Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN: Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel. I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

APPENDIX D

PRELIMINARY INJUNCTION
JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a com-

plaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX E

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 20, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*
No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting what I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heared a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such as a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that

threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone in this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for

expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward [*sic*], and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward [*sic*] and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal

from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out of the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing is unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen have given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutionality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be

no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief, that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX F

RLEA'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In The Matter Of CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

NOTICE OF APPEAL

Notice is hereby given that the Railway Labor Executives' Association, an intervenor herein, appeals to the Supreme Court of the United States from a Preliminary Injunction issued at 4:30 p.m. on June 9, 1980, by the United States District Court for the Northern District of Illinois sitting as a Reorganization Court for the Property of the Chicago, Rock Island & Pacific Railroad Company, by which the court, having declared an act of Congress unconstitutional, enjoined the Interstate Commerce Commission, the Trustee and the Secretary of Transportation from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 95-254 (signed May 30, 1980). This appeal is being taken pursuant to 28 U.S.C. §1252.

JOHN O'B. CLARKE, JR.

John O'B. Clarke, Jr.
HIGHSAW, MAHONEY &
FRIEDMAN, P.C.
Suite 210
1050-17th Street, NW
Washington, DC 20036
(202) 296-8500
Attorneys for Railway Labor
Executives' Association

Dated: June 11, 1980

APPENDIX G

THE GOVERNMENT'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	In Proceedings for the Reorganization of a Railroad. No. 75 B 2697

NOTICE OF APPEAL

Notice is hereby given that the defendants United States of America, Interstate Commerce Commission, and Neil Goldschmidt, Secretary of Transportation, appeal to the Supreme Court of the United States from a Preliminary Injunction issued

on June 9, 1980 by the United States District Court for the Northern District of Illinois enjoining the Interstate Commerce Commission, the Secretary of Transportation and the Trustee of the Chicago, Rock Island and Pacific Railroad Company from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, P.L. No. 95-254, on the grounds that those sections of the Act were unconstitutional. This appeal is taken pursuant to 28 U.S.C. § 1252.

ALICE DANIEL
Assistant Attorney General

JOHN H. BROADLEY

JOHN H. BROADLEY
Special Counsel, Rail Litigation
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530
Tel. (202) 724-7201

OF COUNSEL:

Richard Allen
General Counsel

Henri Rush
Associate General Counsel

Interstate Commerce Commission

APPENDIX H

RLEA'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697 In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL

Notice is hereby given that the Railway Labor Executive's Association, an intervenor herein, appeals to the United States Court of Appeals for the Seventh Circuit from a Preliminary Injunction issued by the United States District Court for the North-

ern District of Illinois on October 15, 1980 by which that Court, sitting as a railroad reorganization court for the Chicago, Rock Island and Pacific Railroad Company, enjoined on constitutional grounds enforcement of Sections 106 and 110 of the Rock Island Transition And Employee Assistance Act, As Amended by the Staggers Rail Act of 1980.

JOHN O' B. CLARKE, JR.
HIGHSAW, MAHONEY &
FRIEDMAN
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

SOLOMON I. HIRSH
HIRSH & SCHWARTZMAN
39 South LaSalle Street
Suite 820
Chicago, Illinois 60603
(312) 236-5925

APPENDIX I

EXCERPTS FROM THE ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT

EMPLOYEE PROTECTION AGREEMENTS

Sec. 106 (a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employee of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy

court shall immediately authorize and direct the Rock Island Railroad trustee to, and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d) (1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof, "the Milwaukee Railroad Restructuring Acts, and the Rock Island Railroad Transition and Employee Assistance Act."

* * *

OBLIGATION GUARANTEES

Sec. 110. (a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX J

EXCERPTS FROM THE CONFERENCE REPORT ON THE RAILROAD TRANSPORTATION POLICY ACT OF 1980 (AMENDMENTS TO THE ROCK ISLAND ACT)

TITLE VII—MISCELLANEOUS PROVISIONS
Rock Island and Milwaukee Railroads Amendments

Sec. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"*Judicial Review*

"Sec. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any

person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability".

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"*Employee Protection Agreements*

"Sec. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with

respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock

Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

(2) Section 108(a) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1007(a)) is amended by inserting immediately before the period at the end thereof the following: "(other than as provided in the agreement entered into in Washington, District of Columbia, on March 4, 1980, entitled 'Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association')."

(3) Section 103(5) of the Rock Island Railroad Transition and Employees Assistance Act (45 U.S.C. 1002(5)) is amended by inserting immediately before the period at the end thereof the following: "the estate of such Company in its reorganization proceeding, or the trustee appointed in such proceeding".

* * *

JOINT EXPLANATORY STATEMENT OF THE CONFERENCE COMMITTEE

Section 701—Rock Island and Milwaukee Railroads [A]mendments

Senate bill. No provision.

House amendment. The House amends the Rock Island Transition and Employee Assistance Act and the Milwaukee Railroad Restructuring Act in several instances. The Amendment provides that any decision with respect to constitutionality of the Rock Island Transition Act or the Milwaukee Railroad Restructuring Act from the respective courts having jurisdiction over the respective railroads in bankruptcy shall be taken to the United States Court of Appeals for the Seventh Circuit. If a constitutional challenge is made to the procedure under this provision, the challenge shall be heard by the United States Court of Appeals for the Seventh Circuit because the procedure is part of the Rock Island Transition Act. Should the appeals on constitutionality involve section 106 or section 110 of the Rock Island Transition Act or sections 9 or 15 of the Milwaukee Railroad Restructuring Act, regarding the claim of administration for employee protection claims, the court shall determine the appeals in a consolidated proceeding and render a final decision no later than 60 days after the last such appeal is filed.

The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge [Mc]Garr's injunction of the Rock Island Transition Act, Justice Stevens

expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, _____ U.S. _____ (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

The House amendment provides for a new schedule for the negotiation of an employee protection agreement between the Rock Island Railroad and the Labor organizations. If these parties are not able to come to an agreement within 5 days, the Commission is to impose a fair and equitable arrangement no less protective of the interests of employees than the protection established under section 9 of the Milwaukee Railroad Restructuring Act within 15 days after the enactment of the Staggers Rail Act. The bankruptcy court shall order the Rock Island Trustee and the Rock Island employee organizations to implement such arrangement immediately. Any order of the Commission or the bankruptcy court with respect to implementing such order shall be appealed only to the United States Court of Appeals for the Seventh Circuit within 5 days after the order of the Commission or the bankruptcy court, whichever is later, and shall be determined within 60 days after the appeal is filed. Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

Under Section 7(d), (e), and (f) of the Milwaukee Railroad Restructuring Act, certain obligations to the United States were subordinated to the creditors, but not the stockholders. Hence, there is a gap between these two classes of interests. The House

amendment eliminates this gap, by forgiving such subordinated obligations to the United States when the Milwaukee Railroad is either successfully reorganized as a rail carrier or when more than 50% of the railroad as it exists on the effective date of the Staggers Rail Act is purchased and 50% of its employees on that date have obtained employment with other carriers. By eliminating this gap in this way, the House amendment will encourage the Milwaukee Railroad's stockholders to seek a successful reorganization or purchase and not feel it necessary to seek liquidation at this time.

Additional funds for Transaction Assistance under the Rock Island Transition Act for the purchase of abandoned lines by non-rail carrier entities of the Rock Island Railroad and Milwaukee Railroad and for rail banking of lines of the Milwaukee Railroad in Montana are made available. The Secretary may determine if applications for purchase filed after September 15, 1980, are appropriate. Other than the funds specifically reserved for Montana[,] Transition assistance funds should be equitably distributed without State preference to non-carrier entities which have applied for funds.

Conference substitute. The Conference substitute adopts the House provision, with minor modifications and deletion of the new findings for the Rock Island Transition Act. The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The

conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.